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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN MONKS et al.,

Plaintiffs and Appellants,

v.

CITY OF RANCHO PALOS VERDES,

Defendant and Respondent.

B172698

(Los Angeles County
Super. Ct. No. YS010425)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lois Anderson Smaltz, Judge. Reversed with directions.

Stuart Miller; Wellman & Warren, Scott W. Wellman and Mitsuruko Uchida for Plaintiffs and Appellants.

James S. Burling for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiffs and Appellants.

Carol W. Lynch, City Attorney; Richards, Watson & Gershon, Gregory M. Kunert and T. Peter Pierce for Defendant and Respondent.

In 1978, the City of Rancho Palos Verdes enacted an ordinance imposing a moratorium on the construction of new homes in an area where an ancient landslide had occurred. Plaintiffs own vacant lots there. But from 1991 to 2002, owners of the vacant lots (“lot owners”) were permitted to build homes if they could show that the home would not aggravate any adverse geologic conditions in the area.

After the city completed the installation of utilities for the vacant lots, plaintiffs attempted to make such a showing and filed a joint application with the city for permission to build on their lots. In 2002, while the application was pending, the city council conducted a public hearing and toughened the criteria for obtaining such an exclusion, making it virtually impossible for plaintiffs to build.

Plaintiffs then filed this action, seeking a writ of administrative mandate to invalidate the new criteria and alleging a claim for inverse condemnation. Plaintiffs contended they did not have a full and fair opportunity to present evidence to the city council, and they therefore sought to introduce evidence in the trial court. The trial court denied that request and ultimately found in the city’s favor based solely on the administrative record.

We conclude that plaintiffs were entitled to produce evidence in the trial court and reverse the judgment.

I BACKGROUND

In ancient times, there was a landslide in part of what is now known as the City of Rancho Palos Verdes. The ancient landslide covers two square miles on the south central flank of the Palos Verdes Peninsula. Plaintiffs’ lots are located on the ancient landslide.¹

In August 1957, an area in the ancient landslide, east and southeast of plaintiffs’ lots, began to slide; this area is commonly known as the Portuguese Bend landslide. Between

¹ There are 20 plaintiffs: John Monks, Lisa Monks, Michael Agahee, Mary Agahee, Raymond M. Barnett, Michael A. Broz, Stephen Case, William Clark, Amy Clark, Richard Cruce, Ariel Compton-Cruce, Christopher Haber, Laura Haber, Michael Kiss, Francis Ruth, Patricia Ruth, Christopher Smith, Dominic Teh, Joe Tabor, and Norma Tabor.

January 1974 and March 1976, an area also in the ancient landslide, south and southwest of the lots, began to slide; this area is commonly known as the Abalone Cove landslide. Both remain active.

On September 5, 1978, the city council enacted an urgency ordinance prohibiting the development of property in the ancient landslide area. Section 6 of the “landslide moratorium” stated: “It has recently come to the attention of the City Council that the land identified in the Landslide Moratorium Map which was previously thought to be stable may in fact be susceptible to or experiencing current landslide movement. In order to protect the public health, safety and welfare[,] it is necessary for the City of Rancho Palos Verdes to conduct extensive geological studies to determine the stability of the land in question and to determine what remedial measures, if any, the City can take to protect residents of the community. Until such geological studies are completed and evaluated[,] it cannot be determined whether grading and new construction in the Landslide Moratorium Area will adversely impact the stability of said area. . . .” (City of Rancho Palos Verdes, Ordinance No. 108U, § 6.)

The city retained Robert Stone & Associates to perform a geotechnical investigation of the Abalone Cove landslide. In a February 28, 1979 report, Stone referred to the area in the northern part of the moratorium, stating in part: “Only two actions are likely to cause renewed sliding within this area. One is loss of support on the downward slope as a result[] of headward propagation of the active Portuguese Bend and Abalone Cove landslides. . . . The other action which could cause renewed sliding would be build up of ground water above the level previously experienced during the last several thousand years.”

In December 1991, the city council established an administrative procedure allowing property owners to seek exclusion from the moratorium. To be exempt, the property owner had to show, among other things, that the proposed development would “not aggravate any existing geologic conditions in the area.” (City of Rancho Palos Verdes Ordinance No. 276 (Dec. 17, 1991).)

On May 26, 1993, Perry Ehlig, the city geologist, sent a memorandum to the director of public works, proposing that the moratorium area be divided into zones. Zone 2

encompassed plaintiffs' lots. There are about 60 developed lots and 41 vacant lots in Zone 2.

Ehlig stated in his memorandum that certain lots in Zone 2 "could be developed without adversely affecting the stability of the large ancient landslide. In fact, if development were combined with installation of additional wells, stability would be improved. Most lots can be developed with minimal grading and without a net import or export of earth. Such grading would have no impact on the stability of the deep-seated slide."

At some point, the city amended its municipal code to allow lot owners to build a "minor" temporary nonresidential structure, provided it was less than 120 square feet, had no plumbing fixtures, did not increase water use, and was approved by the city's director of planning, building, and code enforcement. (See City of Rancho Palos Verdes Mun. Code, § 15.20.040, subd. (I).)

Discussions between city officials and lot owners sometimes focused on the "factor of safety," a geotechnical term used to explain the stability of a parcel of land. The factor of safety is expressed as a number reflecting the relationship between the physical factors that cause instability and those that aide stability. A safety factor of 1.00 indicates that the instability forces are equal to the stability forces, and the property is therefore considered "barely stable or almost unstable." A safety factor of 1.5 indicates that the forces of stability are at least 50 percent greater than the forces that cause instability. For purposes of the present case, a "localized" safety factor refers to the stability of a single lot in Zone 2; a "gross" safety factor refers to Zone 2 in its entirety.

On March 6, 2001, the city council authorized a study by Cotton, Shires & Associates (CSA) to determine — as stated in the minutes — "if it is safe to build on lots with a localized safety factor of 1.5 assuming that the gross area factor is not that high and to determine any cumulative effect by development of the . . . vacant lots." CSA was instructed to review existing data.

On September 12, 2001, CSA submitted an initial report. The city council discussed the report at a regular meeting on September 18, 2001. Bill Cotton, of CSA, attended the

meeting, discussed the report, and answered questions from the council. Members of the public were permitted to speak. Plaintiff John Monks was there and did so. The city provided CSA with additional information and asked that a revised report be prepared.

On January 14, 2002, CSA sent a final report to the city manager. The report stated: “It is our opinion that there is insufficient subsurface information to properly characterize either the depth to the base of landsliding, strength properties of the landslide materials, or the groundwater levels. These parameters are essential elements in the conduct of a thorough slope stability analysis. The standard-of-care for the geotechnical engineering profession is to achieve a factor of safety of 1.50. . . . Without these data, no accurate slope stability analysis can be undertaken, no reliable factor of safety can be calculated, and no dependable landslide mitigation scheme can be designed. We conclude that one cannot quantitatively determine the factor of safety and, therefore, we cannot judge that level of risk of development in the prehistoric landslide area (i.e., Zone 1 and Zone 2).”

The report further stated: “Regarding the question of allowing the remaining lots in Zone 2 to be developed, we believe that the lots can be developed without **causing** the large, regional landslide to be destabilized. This conclusion assumes that individual parcels will be developed using [certain] grading methods and construction techniques, that strict geotechnical review by the City Geotechnical Reviewer and the project geotechnical consultant will be required and that certain conditions . . . are adhered to. In our judgment, the additional development in Zone 2 will be exposed to the same level of unknown potential risk to which existing residents are exposed. If the City decides to allow development of the remaining approved parcels in Zone 2, it should do so with the understanding that the risk of . . . reactivation of all or part of the regional landslide mass is **unknown**. It is clear that the factor of safety of the landslide mass that underlies Zone 2 is above 1.00, but likely less than the industry’s standard safety threshold of 1.50.” (Boldface in original.)

Over the years, the city gradually installed utilities for the vacant lots, namely, gas, electric, water, and sewer. Upon the completion of the sewer system, plaintiffs jointly filed an application with the city’s department of planning, building, and code enforcement,

requesting an exclusion from the moratorium. The application was submitted on January 16, 2002.

On May 20, 2002, while plaintiffs' application was still pending, the city council held an "adjourned" regular meeting to discuss the CSA report. The agenda for the meeting was made public earlier that day, on the city's website and at the meeting location. The agenda stated that the council would consider accepting the conclusions of the CSA report, as follows: (1) there is insufficient subsurface information to calculate a reliable factor of safety; (2) the level of risk of development on the vacant lots cannot be determined; and (3) the factor of safety of the landslide mass that underlies Zone 2 is above 1.00, but likely less than 1.5.

According to the agenda, the city council would also decide whether to approve a proposed standard for granting development permits in Zone 2, namely, to "[c]ontinue to deny requests for development permits for new homes in . . . Zone 2 . . . based on the current lack of evidence that the subject land has a factor of safety of 1.5 or greater, unless an applicant submits a complete Landslide Moratorium application that is supported by adequate geological data." By memorandum circulated to council members the day of the meeting, the city manager recommended that the council accept the conclusions of the CSA report and the proposed standard for granting development permits for new homes.

The council meeting was called to order at 7:05 p.m. Bill Cotton discussed the CSA report and answered questions from council members. Mayor pro tempore Douglas Stern proposed that the council approve several additional conclusions based on his interpretation of the report. The council invited public comments. Plaintiff Monks was present and spoke, saying that he owned three vacant lots and had retained a geologist who determined that his property had a safety factor of 1.5 or higher. Monks supported the use of a localized safety factor of 1.5. After comments from the public, the council approved (1) the conclusions in the CSA report, (2) Stern's additional conclusions (after modification not pertinent to this appeal), and (3) the proposed standard for granting development permits to build new homes in Zone 2.

On June 12, 2002, the city council approved Resolution No. 2002-43, which was intended to set forth the city council's decisions from the May 20, 2002 meeting. The resolution stated in part that city staff should "continue to deny requests for development permits for new homes in the Zone 2 area . . . because of the current lack of evidence that the Zone 2 area has a factor of safety of 1.5 or greater, until an applicant submits a complete Landslide Moratorium Exclusion application that is supported by adequate geological data demonstrating a factor of safety of 1.5 or greater of the Zone 2 area to the satisfaction of the City Geologist; the City Council approves the . . . application, and all other permits to develop [the property] are issued by the City."

At the time of the resolution's adoption, city officials were well aware that, as stated in an October 16, 2000 letter from the city manager to Monks, "the geologists all agree that the gross stability of the land area referred to as Zone 2 has a factor of safety of less than 1.5." As early as March 1996, the city geologist knew that "the factor of safety [for Zone 2] is probably not 1.5 but is greater than 1.25." And the CSA report stated that the safety factor of Zone 2 was "likely well below the geotechnical standard of 1.50."

City officials also knew that a geological study to determine the safety factor of Zone 2 would cost somewhere between \$500,000 and \$1 million. In his memorandum to the city council recommending acceptance of the CSA report, the city manager put the figure at around \$500,000. At the council meeting, Cotton said it would cost "hundreds of thousands of dollars, if not approaching a million dollars probably." Years earlier, the city's director of public works had stated in a January 25, 1997 memorandum to the council that "[e]stimates of the cost of a study range from several hundred thousand dollars to two to three times that amount."

In light of Resolution No. 2002-43, plaintiffs decided not to pursue their pending application for an exclusion from the moratorium. Instead, on July 10, 2002, they filed this action, consisting of a petition for a writ of administrative mandate and a complaint for inverse condemnation. An amended pleading was later filed.

On May 6, 2003, plaintiffs filed a memorandum of points and authorities, arguing that the city council had abused its discretion in approving Resolution No. 2002-43 and that

the resolution constituted a “taking” within the meaning of article I, section 19 of the California Constitution. On page 2 of the memorandum, in footnotes, plaintiffs stated that they “have had no opportunity to testify, to offer opinions of their own experts, or to question City officials and consultants,” and if ““the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking’ . . . , plaintiffs reserve their right to take discovery and introduce additional evidence, particularly in the form of their own testimony, the testimony of experts, and the examination of City officials.”

On July 1, 2002, the city filed an opposition to the petition for a writ of administrative mandate and the inverse condemnation claim.

On July 28, 2002, plaintiffs filed their reply memorandum. In the middle of page 6, they repeated, almost verbatim, the statements previously set forth in the footnotes of their first memorandum.

On October 31, 2002, the parties appeared before the trial court. The transcript of the proceeding shows the following exchange:

“The Court: I set the matter for oral argument because there were some references in the — in your briefs, in your points and authorities, with respect to questioning whether the court would set a hearing. I did conclude, based upon the authorities you submitted, that an evidentiary hearing is not appropriate. So [the court] will rely on the evidence that was previously submitted in the administrative hearing and that was referred to throughout your authorities here. [¶] . . . [¶]

“[Counsel for plaintiffs]: [T]he . . . question the court must ask is whether the plaintiffs had an opportunity before the city for a full and fair hearing, meaning did they have an opportunity to present all of their arguments and evidence to the city before it made its determination. [¶] . . . [¶] . . . [I]f there has not been a full and fair hearing, then the court holds an evidentiary hearing. [¶] . . . [¶]

“Now, in this case there has not been such a full and fair hearing. . . . [¶] . . . [¶] [T]he plaintiffs had no opportunity at all to speak up against these proposals; to present evidence; to present the declarations of experts; to present a technical analysis of the [CSA]

report, which it turned out was the sole basis, or the primary basis, for these resolutions.

[¶] . . . [¶]

“We don’t want to invalidate [the enactments] because we didn’t have a hearing. We want the court to supplement the record with our side of the story and then in the exercise of its independent judgment, determine if the resolutions are an abuse of discretion or not.”

Later in the hearing, counsel for plaintiffs stated: “And as the *Healing* case said [*Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158 (*Healing*)], . . . ‘[T]he nature as well as the legitimacy of the state’s interest are questions for a court of law to decide at an evidentiary trial. They are not to be decided by the city at any administrative or local legislative level.’ [¶] These are trial issues now. A city does not have the power, does not have the ability, does not have the jurisdiction to determine if its own actions constitute a taking. . . . This requires a trial to the extent that any issue of fact is in dispute.”

Counsel for the city replied: “[I]n the majority of cases alleging a regulatory taking in this state, I think what happens is you find that the case is resolved in proceedings like this today, that the record before the court presents sufficient evidence — and this record certainly does — to determine whether or not the regulation goes too far in the rubric of the takings clause”

After hearing argument from both sides, the trial court stated on the record that the writ petition was denied and that Resolution No. 2002-43 did not constitute a taking. The trial court later filed a statement of decision, stating in part, “The court perceives no need for further evidentiary hearings or trials.” Judgment was duly entered in favor of the city. Plaintiffs appealed.

II

DISCUSSION

Plaintiffs contend the trial court should have conducted an evidentiary hearing on their takings claim and permitted them to submit evidence outside the administrative record. For its part, the city argues the takings claim is not ripe, and this suit is barred by the statute of limitations. We agree with plaintiffs’ contention and reject the city’s arguments.

A. Evidentiary Hearing

The city argues that the trial court acted properly in adjudicating plaintiffs' takings claim based solely on the administrative record. Not so.

In *Healing, supra*, 22 Cal.App.4th 1158, the owner of a vacant lot filed a petition for a writ of administrative mandate and complaint for inverse condemnation, alleging that the California Coastal Commission had unlawfully denied his application to build a house on his property. The commission argued that "the takings issues were to be determined on the administrative record, not at a 'trial' in which evidence might be considered." (*Id.* at p. 1165.)

We disagreed, stating: "Healing contends his suit for inverse condemnation has to be tried, first to the court to determine whether there is liability for a taking and then, if there is liability, to a jury to determine the amount of compensation owed to Healing. The Commission contends the takings issues are properly decided as part of Healing's petition for administrative mandate, on the basis of the administrative record, subject to the limited augmentation allowed by subdivision (e) of section 1094.5 of the Code of Civil Procedure. The trial court agreed with the Commission. We agree with Healing. [¶] . . . [¶]"

"[W]e hold that review by way of administrative mandate is not an adequate substitute for a court trial of the takings issues raised by an inverse condemnation claim based on the Coastal Commission's denial of a development permit. [¶] . . . [¶]"

"The question, then, is whether a trial court can determine taking liability based upon an administrative record created under circumstances where, as the Commission concedes, witnesses are not sworn, testimony is not presented by means of direct or cross-examination but rather by narrative statements, and the Commission does not have the authority to issue subpoenas or compel anyone to attend its hearing." (*Healing, supra*, 22 Cal.App.4th at pp. 1169–1170.)

In *Healing*, we examined at length two takings cases decided by the United States Supreme Court. (See *Healing, supra*, 22 Cal.App.4th at pp. 1170–1173, discussing *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 and *Lucas v. So. Carolina Coastal Council* (1992) 505 U.S. 1003.) We then explained: "The Commission contends

the legitimacy of the regulation which forms the basis of a regulatory taking defeats the landowner's claim to just compensation. . . . [¶] . . . [¶]

“Applied to the case before us, the rules announced [by the Supreme Court] demonstrate (1) the fallacy of the Commission's suggestion that there can be no inverse condemnation when it enforces a valid regulation and (2) the inadequacy of administrative review to determine the takings issues.

“Assuming Healing would concede the validity of the Coastal Act, he would nevertheless be entitled to pursue his inverse condemnation claim and to an opportunity to inquire into the degree of harm to public lands and resources or adjacent private property posed by his proposed three-bedroom house; the social value of his activities and their suitability to the locality in question; [and] the relative ease with which the alleged harm can be avoided through measures taken by Healing and the Coastal Commission[, among other things].

“The Commission, of course, would have an opportunity to show that changed circumstances or new knowledge may make what was previously permissible no longer so, and the parties could then present evidence about whether other landowners, similarly situated, are permitted to continue the use denied to Healing. . . .

“These are questions for a court of law to decide at an evidentiary trial, not by mandamus review of an administrative record of proceedings where the parties' right to present evidence was limited by the very nature of the administrative process. . . . ‘ . . . [A] court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land.’ . . .

“To resolve this issue, evidence must be considered. ‘The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the [owner's] property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. These things typically cannot be assessed properly without a factual record.’ . . .

“Accordingly, the mere fact that the regulation at issue has a legitimate public purpose is not a sufficient reason to deny compensation to the property owner whose land is rendered useless by the regulation. Instead, the agency’s obligation to pay just compensation is to be determined by a balancing of the competing interests . . . , a process which necessarily requires a trial. . . . [A]dministrative mandate is not a substitute for a trial on the takings issues. ¶¶ . . . ¶¶

“. . . [W]e find nothing . . . to support the Coastal Commission’s contention that an inverse condemnation claim, when properly preceded by or joined with a petition for a writ of mandate, is to be determined as part of the mandate petition, on the basis of the administrative record, without a trial on the merits of the takings issues. ¶¶ . . . ¶¶

“[T]he takings issues raised by an inverse condemnation action alleging a regulatory taking arising from the Coastal Commission’s denial of a development permit are to be determined in a court trial. If the administrative mandate petition is heard first, the doctrine of collateral estoppel may bar relitigation of some of the facts in the subsequent takings trial. . . . If, as *Healing* proposed in this case, the hearing on the mandate petition and the trial on the takings issues are held at the same time, the process might be more efficient for both the court and the parties and the res judicata problems would be avoided. We emphasize, however, that we do not decide in this case that any particular procedure or sequence of decisions is required, only that a trial is necessary.” (*Healing, supra*, 22 Cal.App.4th at pp. 1173–1179, citations omitted.)

Five months after we decided *Healing*, our Supreme Court addressed similar issues in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 (*Hensler*). As the high court explained: “The Fifth Amendment to the United States Constitution conditions the state’s right to take private property for public use on the payment of ‘just compensation.’ It leaves to the state, however, the procedures by which compensation may be sought. ‘If the government has provided an adequate process for obtaining compensation, and if resort to that process “yield[s] just compensation,” then the property owner has no claim against the Government for a taking.’ . . .

“California provides such a process by making available an action for inverse condemnation if, after exhausting administrative remedies to free the property from the limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted. In that action the court determines whether the restriction on development ‘goes too far’ and will be constitutionally impermissible unless just compensation is paid for the taking brought about by the restriction.

“When property is damaged, or a physical invasion has taken place, an inverse condemnation action may be brought immediately because an irrevocable taking has already occurred. If the alleged taking is a ‘regulatory taking,’ i.e., one that results from the application of zoning laws or regulations which limit development of real property, however, the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking. The owner may do so, where appropriate, by a facial challenge to the ordinance, but in most cases must seek a variance if that relief is available and then exhaust other administrative and judicial remedies. The facial challenge may be through an action for declaratory relief [A]n ‘as applied’ challenge to the development restrictions imposed by the administrative agency, may be properly made in a petition for writ of ‘administrative’ mandamus to review the final administrative decision . . . and that action may be joined with one for inverse condemnation. . . . Damages for the ‘taking’ may be sought in an administrative mandamus action . . . , or, if the plaintiff seeks a jury trial, in the joined inverse condemnation action. [¶] . . . [¶]

“In some cases, all of the evidence necessary to establish a taking claim may have been presented in the administrative proceeding. If it was not possible for the landowner to present that evidence, it may be introduced in the mandate proceeding. Subdivision (e) of Code of Civil Procedure section 1094.5 permits the introduction of additional evidence that is relevant to a challenge to the administrative action if [in the exercise of reasonable diligence] the evidence ‘could not have been produced or . . . was improperly excluded at

the hearing before' the administrative agency. Thus, the trial court is able to resolve the taking claim in the mandate proceeding.

"A landowner is . . . entitled to a jury trial in an inverse condemnation action. Article I, section 19 of the California Constitution provides: 'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.' Therefore, the right to jury trial applies in inverse condemnation actions, but that right is limited to the question of damages. . . .

"A property owner is, of course, entitled to a judicial determination of whether the agency action constitutes a taking. (*Healing*[, *supra*,] 22 Cal.App.4th 1158[.]) Administrative adjudication in the course of exercising an administrative agency's regulatory power, if subject to judicial review, does not deny participants their right to judicial determination of their rights. . . . We agree with the *Healing* court, however, that an administrative agency is not competent to decide whether its own action constitutes a taking and, *in many cases, administrative mandate proceedings are not an adequate forum in which to try a takings claim.*

"If the administrative hearing is not one in which the landowner has a *full and fair opportunity to present evidence relevant to the taking issue, one in which witnesses may be sworn, and testimony presented by means of direct and cross-examination*, the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking. . . . A judicial determination is available in the mandate proceeding, however, if the administrative action is challenged on the basis that it is a compensable taking, the hearing *did permit full litigation of the facts relevant to the takings issue*, and any additional issues are litigated before the court. Because a taking of property is alleged, the court must accord the owner de novo review of the evidence before the agency in ruling on the taking claim . . . and consider any additional evidence admitted at the hearing on the petition for writ of mandate.

"If the owner believes the hearing before the administrative agency was not adequate, the owner is assured a full and fair hearing by exercising his right to join an inverse

condemnation action with the mandate proceeding. In the inverse condemnation proceeding the owner may both litigate the taking claim, and, if successful, assert the right to jury trial” (*Hensler, supra*, 8 Cal.4th at pp. 13–16, citations omitted.)

As one court later stated in discussing both *Healing* and *Hensler*, “‘administrative mandate is not a substitute for a trial on the takings issues.’” (*Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 411; see generally Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: ‘Healing’ California’s Confused Takings Law* (1994) 22 Pepperdine L.Rev. 99, 102–103, 120–122, 124–126.) And one commentator has noted: “[The] unanimous opinion in *Hensler* skillfully weaved together an assortment of appellate decisions and unified them under the rubric of long-standing Supreme Court doctrine and constitutional mandates. A crucial element in this elaborate reconciliation was the *Hensler* court’s citation — and strong endorsement — of a recent decision of the Second Appellate District, *Healing v. California Coastal Commission*.” (Browne, *supra*, 22 Pepperdine L.Rev. at p. 103.)

According to a leading treatise: “[A] claim of inverse condemnation alleging a regulatory taking must be litigated *in a trial on the merits* and after the judicial determination in a proceeding for administrative mandamus. The court may hear the mandamus proceeding prior to the takings trial, or at the same time, but the takings issue must be determined *in a trial on the merits*. [¶] . . . [¶]

“[T]he claim for liability for a regulatory taking should be decided in an evidentiary trial and not in the proceedings for administrative mandamus. In administrative proceedings witnesses are not sworn, testimony is not taken, and there are no rights to discovery or to subpoena witnesses. In contrast, whether there has been a regulatory taking requires extensive evidentiary examination into whether the government action advances legitimate state interests or denies the owner the economically viable use of his or her land, the degree of harm to the public and adjacent owners from the project, the suitability of the project, avoidance of the harm, and the historic use of the land and surrounding area.

“Even though the regulation has a legitimate public purpose, an administrative proceeding is not an adequate forum for the evidentiary findings required for determining

whether there has been a regulatory taking, and the agency does not have the jurisdiction for conducting such a hearing. The owner must exhaust his or her administrative remedies by allowing the agency to take appropriate action or for a court to declare the agency's action invalid, but the mandate proceeding is not the appropriate forum for determination of the takings issue.” (11 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 30:31, pp. 169–171, italics added, fns. omitted.)

In this case, plaintiffs argued in the trial court that, under *Hensler* and *Healing*, (1) the trial court was required to conduct an evidentiary hearing because the city council did not give lot owners an opportunity to present their own testimony or the testimony of experts, or to cross-examine witnesses and (2) plaintiffs' takings claim raised issues for a court of law to decide at an evidentiary hearing, not by mandamus review of the administrative record. On appeal, plaintiffs present the same arguments. They also quote *Hensler* for the proposition that a property owner is entitled to an evidentiary hearing in the trial court if the administrative hearing did not accord them the right to present the testimony of witnesses, under oath, and by way of direct and cross-examination.

In response, the city asserts that plaintiffs had an adequate opportunity to be heard by the city council because: (1) they could — and some did — attend public meetings related to the CSA report; (2) the city solicited public comments on the CSA report; and (3) plaintiffs could have submitted any geological or technical information to the city for consideration by the council. But these methods of communication do not constitute the requisite *evidentiary hearing* required by *Hensler* and *Healing*. Because the city did not provide such a hearing, plaintiffs are “assured a full and fair hearing by exercising [their] right to [bring] an inverse condemnation action . . . [in which they] may both litigate the taking claim, and, if successful, assert the right to jury trial . . .” (*ibid.*). Simply put, “in many cases, administrative mandate proceedings are not an adequate forum in which to try a takings claim” (*ibid.*), and this is one of them.

We conclude that the trial court should have conducted an evidentiary hearing on plaintiffs' takings claim and should have permitted plaintiffs to introduce evidence outside the administrative record. On remand, the trial court shall do so.²

B. Ripeness

In general, "[t]he impact of a law or regulation on the owner's right to use or develop the property cannot be assessed until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction. A final administrative decision includes exhaustion of any available review mechanism. Utilization of available avenues of administrative relief is necessary because the court 'cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.'" (*Hensler, supra*, 8 Cal.4th at p. 12.) "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" (*Id.* at p. 10.)

But "[w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. . . . [¶] . . . [¶] In assessing the significance of [a landowner's] failure to submit applications to develop the [property] it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because '[a] court cannot determine whether a regulation goes "too far" unless it knows how far the regulation goes.' . . . Ripeness doctrine does not require a landowner to submit applications for their own

² Given the basis for our conclusion, we do not reach the question of whether plaintiffs had timely or adequate notice of the May 20, 2002 city council meeting and what transpired at that meeting. (See *Hensler, supra*, 8 Cal.4th at p. 15; Code Civ. Proc., § 1094.5, subd. (e).)

sake. [A landowner] is required to explore development opportunities on his . . . parcel only if there is uncertainty as to the land's permitted use.” (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 620–622.)

“[C]ourts have recognized the ripeness requirement cannot be used to require that property owners resort to ‘piecemeal litigation or otherwise unfair procedures.’ . . . The Ninth Circuit ‘recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. . . . Under this exception, . . . the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile. . . . The landowner bears the burden of establishing, by more than mere allegations, the futility of pursuing any of the steps needed to obtain a final decision. . . . Moreover, before claiming the exception, the landowner must submit at least one development proposal and one application for a variance if *meaningful* application and submission can be made. . . .’ . . . [¶] . . . [¶]

“The futility exception as articulated in California cases has largely followed the pattern described by the Ninth Circuit That is, our cases have recognized that the exception is narrow and that it requires some development proposal by the landowner and that only when, by way of its response to the proposal, a governmental agency has as a practical matter defined what development will be allowed may a court then determine whether there has been a taking. ‘The futility exception is extremely narrow: “[T]he mere possibility, or even the probability, that the responsible agency may deny the permit should not be enough to trigger the excuse. . . . To come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so).” . . .’” (*Calprop Corp. v. City of San Diego* (2000) 77 Cal.App.4th 582, 593–594, italics added, citations omitted.)

In addition, courts may consider the expense of the administrative process as one factor in determining whether exhaustion is appropriate. (See *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 613–614.) Exhaustion may be required ““when the administrative proceeding involves *no unusual* expense.”” (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1829, italics added; accord, *Kane v. Redevelopment Agency* (1986) 179 Cal.App.3d 899, 907, fn. 4.)

In this case, plaintiffs submitted an application to be excluded from the moratorium. While the application was pending, the city approved Resolution No. 2002-43, requiring lot owners to submit geological data — at a cost \$500,000 to \$1 million — showing that Zone 2 has a safety factor of 1.5 or higher — notwithstanding that “the geologists all agree that the gross stability of the land area referred to as Zone 2 has a factor of safety of less than 1.5.”

By way of this suit, plaintiffs challenge the requirement that they show a safety factor of 1.5 for the entire zone. They argue that a lower safety factor should be used and that the safety factor of an individual lot, not the zone, should be determinative.

The outcome of the administrative process is certain: plaintiffs’ applications for an exclusion from the moratorium would be denied because they cannot show that the safety factor of the zone is 1.5 or higher. Given this, plaintiffs cannot build homes on their lots. Thus, it is clear “how far the regulation goes.” (*Hensler, supra*, 8 Cal.4th at p. 12.) And the inordinate expense of the administrative process counsels against exhaustion.

Finally, the city takes the position that Resolution No. 2002-43 was based on the CSA report. The trial court concluded in its statement of decision, “Any assumption on [plaintiffs’] part that the City Council would disregard the conclusions of the CSA report and apply a standard inconsistent with CSA’s conclusions was unreasonable.” In other words, exhaustion was futile.

In light of these circumstances, plaintiffs need not exhaust administrative remedies.³

³ Where a city’s “general plan” does not preclude all development of the property, the landowner may be required to seek a variance or to “scale down” the size, scope, or intensity of the proposed development. (See *Calprop Corp. v. City of San Diego, supra*, 77 Cal.App.4th at pp. 594–595; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 325–330; *Milagra Ridge Partners, Ltd. v. City of Pacifica* (1998) 62 Cal.App.4th 108, 117–120.) That is not possible here. The property is already zoned for residential use, so a meaningful variance is not available. And the moratorium, together with Resolution No. 2002-43, precludes the construction of residential structures regardless of size, scope, or intensity. The city allows only a small temporary *nonresidential* structure on vacant lots.

C. Statute of Limitations

The city contends this action is barred by the statute of limitations, specifically, section 65009, subdivision (c)(1)(B) of the Government Code, which states: “[N]o action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body’s decision: [¶] . . . [¶] . . . To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.”

The city maintains that plaintiffs had to file suit within 90 days after the moratorium was initially enacted on September 5, 1978. We disagree. For one thing, on its face, the moratorium did not forever preclude the construction of new homes. It stated in part: “[I]t is necessary for the City of Rancho Palos Verdes to conduct extensive geological studies to determine the stability of the land in question and to determine what remedial measures, if any, the City can take to protect residents of the community.” Further, after the enactment of the moratorium, the city took several steps suggesting that new homes might one day be allowed. For example, it installed utilities for the vacant lots — gas, electric, water, and sewer.

And finally, plaintiffs do not challenge the 1978 moratorium. Rather, they attack Resolution No. 2002-43, which requires them to show that the safety factor of Zone 2 is 1.5 or higher. Even the city acknowledges in its brief that “[t]he requirements for exclusion applications remained substantially unchanged from 1991” — when the city established an administrative exclusion process — “to 2002” — when Resolution No. 2002-43 was enacted. That resolution was approved on June 20, 2002. This action was filed on July 10, 2002. It is therefore timely.

III
DISPOSITION

The judgment is reversed. On remand, the trial court shall conduct an evidentiary hearing in accordance with this opinion. Plaintiffs are entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

SUZUKAWA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.